



**DAM v ASI (Miscellaneous Cause E800 of 2023) [2023] KEKC 14 (KLR) (10 July 2023) (Ruling)**

Neutral citation: [2023] KEKC 14 (KLR)

**REPUBLIC OF KENYA**  
**IN THE KADHI'S COURT AT UPPER HILL (NAIROBI MILIMANI LAW COURTS)**  
**MISCELLANEOUS CAUSE E800 OF 2023**  
**AH ATHMAN, SPK**  
**JULY 10, 2023**

**BETWEEN**

**DAM ..... APPLICANT**

**AND**

**ASI ..... RESPONDENT**

**RULING**

1. The notice of motion application dated June 2, 2023 brought under the provisions of section 5 of the *Kadhi's Court Act*, Cap 11 Laws of Kenya, Part IX, Section 57 [1] of the *Marriage Act* No 4 of 2014, order 53 of the *civil procedure rules* and all other enabling provisions of the law seeks orders that this Honourable court be pleased to issue an interpretation in law on whether one pronouncement of talaq after the lapse of the iddah period can be deemed to be valid divorce in accordance with the Muslim law.
2. The applicant deposed that she was married to the respondent one ASI on April 27, 2013 at Hurlingham mosque, Nairobi. She deposed that after two years and seven months the marriage irretrievably broke down and they divorced on November 11, 2015 and they were issued certificate of divorce entry number KCDC Exxx of 2021 serial number 08xxx the divorce was registered as revocable. The applicant after completion of iddah got married to one OM a Canadian citizen on June 26, 2021. She applied for Canadian citizenship by virtue of her marriage to current husband was refused because the divorce was revocable and therefore not recognised in Canadian law.
3. Kadhi's courts in Kenya are established under article 169 of the *Constitution of Kenya (2010)*. Article 170 (5) confers it with jurisdiction to 'determine questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's Courts. Interpretation of questions of Muslim law therefore fall, at the first instance, within its jurisdiction.
4. Divorce though eschewed is legal under Islamic law. It is often a last resort and there are inbuilt mechanisms within Islamic marriage and divorce laws which if, properly followed, would lead to



minimal divorce rates. The general rule, a covenant taken in public at marriage specifically by the husband, is to treat her with kindness and in the event of divorce to also treat her with kindness. Q.2.228 provide:

‘The divorce may be pronounced twice, then keep them in good fellowship or let them go with kindness’

5. Talak as defined by Hamilton in *Hidaya* vol 1 at page 200 ‘signifies the dissolution of marriage as the annulment of its liability by the use of certain words.’ Divorce though eschewed is legal under Islamic law. It is the most abhorred by the Almighty Allah of legal issues. It has to be exercised with restraint and upon serious consideration. The general rule, a covenant taken in public at marriage specifically by the husband, is to treat her with kindness and in the event of divorce to also treat her with kindness. Q.2.228 provide:

‘The divorce may be pronounced twice, then keep them in good fellowship or let them go with kindness’

6. Under Islamic law, the husband has the original jurisdiction to effect divorce. He does not leave of court or any organisation to exercise this inherent legal right. upon pronouncement by the husband, divorce is effective. It should be written, dated and witnessed to authenticate it. Part IX, Section 57 [1] of the *Marriage Act* No 4 of 2014 requires it be registered within reasonable time.

Narrated Abu Huraira [RA] that the Prophet [PBUH] said: Three issues are considered effective upon pronouncement, whether one is serious or in jest: marriage, divorce and raj’at [returning wife to marriage contract after divorce before expiry of edda period in a revocable divorce]. Reported by the five Imams of Hadith except Al Nasa’i.

7. Section 372 of the KCBB states:

“Once uttered by the husband through the express pronouncement, divorce becomes effective. However, in using symbolic words, the husband must have intended the divorce for it to become effective.”

8. SC Sircar in ‘Marriage, dowry, divorce, Al Sharia Sunni and Imamiyah’ at page 389 states:

‘The divorce of every husband is effective if he be of sound understanding and mature age, but that of a boy or a lunatic or one talking in his sleep is not effective.’

9. There exist different modes of divorce; in terms of types of divorces it is divided into approved (talaq al sunnah) and disapproved divorce (talaq al bid’a). In terms of its effectiveness it is categorised into revocable (talaq al raj’i) and irrevocable divorce (talaq al ba’in). Approved divorce is one that fully meets the requirements ordained by Allah and His prophet. Disapproved divorce does not meet all the requirements, it is where a husband pronounces all the talaqs at once or simultaneously or while the wife is in a state of impurity or in a state of purity but have enjoyed conjugal rights in this period. A revocable divorce is the first or second divorce. The third divorce is considered major irrevocable. In a revocable divorce the spouses can remarry without necessity of new marriage contract. An irrevocable divorce is absolute, the spouses cannot remarry unless they meet very stringent conditions. Irrevocable divorce is either minor or major. A revocable divorce turns into a minor irrevocable divorce upon expiry



of the edda period which is approximately (90) days from date of pronouncement of the divorce under Q.2.228. It provides:

“and divorced women shall wait (as regards their marriage) for three menstrual periods, and it is not lawful for them to conceal what Allah has created in their wombs, if they believe in Allah and the last day. And their husbands have the better right to take them back in that period, if they wish for reconciliation.’

10. The verse provides both the normal edda period and rules relating to revocable marriages. Abu Abdallah Muhammad ibn Ahmad ibn Abubakar al Qurtuby in his ‘al Jami’ lihkam al Qur’an’ Encyclopedia of rules of Qur’an on interpreting the above verse state:

‘there is consensus among Muslim scholars that a free husband is more entitled to return his free wife into the fold of marriage (without need of new marriage contract), if divorces his wife in a consummated marriage, provided it is before the expiry of iddah, otherwise the divorced wife becomes alien to him and cannot be returned into the marriage (merely by the husbands’ declaration) except with a new marriage proposal and contract, with consent of waliy and witnesses.’

11. Expounding on the issue, Abu al Qassim Muhammad ibn Ahmad ibn Juzzy al Maliki in his ‘Al Qawanin an Fiqhiyyat’ Laws of Islamic jurisprudence’ at page 368 categorizing types of divorces and their effect stated:

‘There are four situations of irrevocable (or irreversible) divorce: divorce of wife whose marriage is not consummated, Khul’ and three divorces. These are irreversible by consent of Muslim scholars. The fourth one is what is effected by our contemporaries, where the husband delegate the power to effect divorce to the wife. Some scholars, in agreement with Ibn Al Qassim, consider it one divorce and not Khul’ and the husband may return her to his marriage; others consider it in the power of three divorce. Revocable divorce is other than the above situations. The husband, in a revocable divorce, is entitled to take her back in marriage before the lapse of the idda period. During this period, he is obligated to provide for her sustenance and clothing. Upon its expiry the divorce becomes (minor) irrevocable; he cannot retake her into the marriage except with her consent. He is no longer obligated to provided her with sustenance and clothing. An irrevocable divorce on the other hand becomes effective immediately upon its pronouncement.’

12. In a minor irrevocable divorce, parties may remarry but only under a new marriage contract; but the divorced wife is at liberty, if she so desires, to be married to another husband other than her previous husband. These provisions are clearly elaborated in the Kadhis bench book sections 377 -388. Expounding on this, SC Sircar, in ‘al – Shari’a, Sunni and Imamiyah code’ at page 383 states:

‘Repudiation or divorce is ether revocable (raj’i) or irrevocable (ba’in). In the ahsan or best from, the single repudiation that is pronounced is revocable before the completion of the iddat, after which it is irrevocable or irreversible; in other forms, the first and second are revocable, with respect to an engaged wife, and the third is always irrevocable.’

13. In the instant application, the first divorce was revocable (within the iddat period) upon its expiry on February 11, 2016 without remarriage or reunion of the spouses, it changed to minor irrevocable divorce and the applicant was therefore free to marry another husband. She was married to OM on June 26, 2021, more than five (5) years after the expiry of the iddah period from the marriage to ASI .



There was thus, which we hereby find and hold, no legal impediment by reason of existing marriage to this second marriage between the applicant and OM . It is therefore valid and legal.

14. No orders as to costs.

**DATED AND DELIVERED AT NAIROBI ON 10<sup>TH</sup> DAY OF JULY 2023**

**HON. ABDULHALIM H. ATHMAN**

**SENIOR PRINCIPAL KADHI**

